No. 09-1509

SUPREME COURT, U.S.
JUL 12 2010

IN THE

Supreme Court of the United States

COAST AUTOMOTIVE GROUP, LTD., *et al.*,

Petitioners,

v.

MERCEDES BENZ, U.S.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT RAY CATENA MOTOR CARS, CORP.

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QUESTION PRESENTED

Whether the courts below correctly entered and then affirmed summary judgment against Petitioners for lack of required damage proofs after Petitioners' defective expert opinions were excluded.

LIST OF PARTIES

The Petitioners Coast Automotive Group, Ltd. and Tamim Shansab are the Defendants/Counterclaimants/Third Party Plaintiffs. The Respondents are Plaintiff/Counterclaimant/Defendants Mercedes Benz, U.S.A., and Third Party Defendants David Michael Motor Car Corp.; Ray Catena Motor Cars Corp.; and Contemporary Motor Cars, Corp..

CORPORATE DISCLOSURE STATEMENT AS REQUIRED BY SUPREME COURT RULE 29.6

Third-Party Respondent, Ray Catena Motor Cars, Corp. ("Catena"), has no parent corporation. No publicly held corporation has a financial interest in the proceedings through Catena. Catena is a closely-owned corporation with a single shareholder, Mr. Catena.

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STATEMENT OF THE CASE

A. Introduction

This action arises from Respondent Mercedes Benz USA's ("MBUSA's") termination of Petitioner, Coast Automotive Group's ("Coast's") dealer franchise agreement. Coast's principal, Tamim Shansab ("Shansab"), misrepresented his financial status on the franchise application. Coast committed other breaches of the franchise agreement. MBUSA sued Coast to terminate its franchise, to enjoin further use of its trademark and to obtain other relief. Petitioners counterclaimed, alleging that MBUSA violated antitrust laws by engaging in a price-fixing scheme with other dealers, thereby causing damage to Coast's business. The petition seeks to reverse summary judgment dismissing counts five through ten of the counterclaim, which alleged violations of the Sherman and Clayton Acts. 15 U.S.C. § 1 et seq; 15 U.S.C. § 15.

The crux of Petitioners' argument below was that MBUSA reduced Coast's allocation of cars in retaliation for Coast's refusal to join the price-fixing conspiracy, thereby harming Coast's business. An antitrust plaintiff seeking treble damages under § 4 of the Clayton Act has to prove an antitrust violation, *a fact of damage or injury*, and measurable damages. *Kresky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3rd Cir. 1983) (emphasis added). The district court granted summary judgment to MBUSA and the third-party dealers (including Catena) on the applicable counts because Petitioners failed to demonstrate essential elements of their claims, namely fact of damage or injury and failed to establish

damages based on that fact of injury. The Circuit court appropriately affirmed in a decision and order that it considered "non-precedential." 6a.

To prove damages, Petitioners relied exclusively upon two defective expert opinions. The first, by Markovitz, improperly relied on Shansab's own unsubstantiated hearsay assertions that Coast's allocation of cars was reduced by MBUSA. 44a; 49a; 53a. Markovitz did not conduct any independent, scientific or analytical analysis to determine what a fair allocation should have been, how it had changed before or after the alleged antitrust violation or to what degree other forces may have acted on the allocation. 53a-54a. The second expert, Del Roccili, based his calculations on these same speculative hearsay assumptions. Neither opinion was grounded in any facts in the case. Therefore, the expert opinions lacked reliability and fit. The district court properly excluded that testimony pursuant to the evidentiary standard to admit expert opinion testimony. *Fed. R. Evid.* 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Petitioners do not contend that the courts below erred in excluding the expert testimony based on the *Daubert* analysis of reliability or fit. Summary judgment was correctly granted because the Petitioners failed to come forth with admissible evidence to sustain each element of their claims. Despite "new packaging" of their arguments on the Petition, which now includes reliance on selective quotations from unavailable hearsay news reports, nothing has changed.

B. Procedural History

The district court granted summary judgment on September 29, 2006 and denied Petitioners' motion for reconsideration on July 25, 2007. Petitioners filed a timely appeal. The Third Circuit Court of Appeals affirmed the district court on January 25, 2010 and denied a rehearing on March 10, 2010.

REASONS FOR DENYING THE PETITION

The Determinations by the Courts Below Are Consistent with Settled Precedent, and Petitioners have Failed to Show Any Compelling Basis for Supreme Court Review.

Petitioners have presented no compelling reason to grant *Certiorari*. *See*, Sup. Ct. R. 10. Petitioner has failed to demonstrate that the judgments entered by the courts below (granting and then affirming summary judgment in favor of Respondents on counts five through ten of Petitioners' antitrust counterclaim, all of which are private claims) are in conflict with any decision of this Court or any other Court of Appeals. Petitioners have not posed any important or substantial question of federal law or other public interest that has not already been settled by this Court.

Petitioners wrongly contend that that the courts below improperly demanded that the experts "independently verify liability," and that the courts "created a new rule" blending antitrust causation and antitrust damages calculation, which creates a heightened burden for plaintiffs. Pet. Br. vi. To the contrary, the district court properly found that once Petitioners' defective expert opinions were excluded under

its careful *Daubert* analysis, Petitioners had not and could not establish the requisite "nexus between the violation and the injury" to establish fact of damage or injury. *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3rd Cir. 1980), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029, 69 L. Ed. 2d 405 (1981). Petitioners failed to establish through their experts or otherwise that Coast's allocation of new cars from MBUSA after the alleged anti-trust violation was retaliatory or actually created "depreciation in value." Pet. Br., p. 14; *See, Story Parchment v. Patterson Parchment Paper Co.*, 282 U.S. 555, 566, 51 S. Ct. 248, 252, 75 L. Ed. 544, 550 (1931) (noting a depreciation in value [or fact of injury] as the proper starting point for the jury's consideration of whether alleged unlawful acts cause the depreciation). While Petitioners harken to "the record [of] direct threats against Coast's allocation which must be accepted as true for purposes of summary judgment," they never explain how these direct threats prove that MBUSA discriminated against Petitioner in its allocation – *i.e.* the fact of damage or injury. Pet. Br. at 16.

Petitioners further assert that the Third Circuit "misapprehended this Court's prior precedents in making its analysis." Pet. Br. at 16. Respondent respectfully submits that it is Petitioners who misapprehend this Court's prior precedents – essentially confusing the necessity of offering a fact of damage or injury with this Court's holdings that antitrust plaintiffs should not be imposed upon to ascertain damages with specificity in anti-trust suits. *See, J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981); *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1968); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 55, 51 S. Ct. 248, 75 L. Ed. 544 (1931).

Counts five through ten of Petitioners' counterclaim were correctly dismissed on summary judgment because Petitioners' claims failed as a matter of law. Petitioner "did not establish that it was injured by any of the defendant's allegedly unlawful conduct, did not sustain its burden of proving that the damages it claimed to have suffered were causally related to such conduct, and did not provide the court with a reasonable estimate of damages." *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 254 (3rd Cir. 1980). Nothing in the Petition even remotely suggests how Petitioners would establish the missing legal elements of their claims if they were granted a trial. Petitioners offer no compelling reason why this Court should now grant *Certiorari*.

Petitioner likewise demonstrates no compelling reason why applicable precedent, requiring that "fact of injury" be proven in an anti-trust case, should be disturbed. Although Petitioners suggest that the courts below crafted "a new rule" for anti-trust summary judgment analysis, Petitioners fail to explain away controlling case law that requires that even if Respondents' acts were shown to have violated the Clayton Act, Petitioners may not recover unless a nexus to their own injury is also demonstrated, nor do Petitioners explain why this case should escape such an analysis. *Kreisky Enterprises Corp. v. Magid*, 716 F.2d 206, 209 (3rd Cir. 1983); *Van Dyk Research Corp. v. Xerox Corp.*, 631 F.2d 251, 255 (3rd Cir. 1980), *cert. denied*, 452 U.S. 905, 101 S. Ct. 3029, 69 L. Ed. 2d 405 (1981) ("plaintiff has the burden of proving that the established illegality was a material cause of the injury.")

An antitrust plaintiff seeking treble damages under section 4 of the Clayton Act must prove an antitrust violation, *fact of damage or injury*, and measurable

damages. *Kresky*, 716 F.2d at 209 (emphasis added); *See also*, *Deaktor v. Fox Grocery Co.*, 475 F.2d 1112, 1116 (3rd Cir. 1973), *cert. denied*, 414 U.S. 867, 94 S. Ct. 65, 38 L. Ed. 2d 86 (1973). In *Van Dyk*, the Third Circuit affirmed the lower court's judgment dismissing plaintiff's claims because plaintiff "did not establish that it was injured by any of the defendant's allegedly unlawful conduct, did not sustain its burden of proving that the damages it claimed to have suffered were causally related to such conduct, and did not provide the court with a reasonable estimate of its damages." *Van Dyk*, 631 F.2d at 254. As recognized in *Van Dyk*, the fact of damage or injury element requires plaintiff to show a nexus between the violation and the injury. *Kresky*, 716 F.2d at 209 (*citing*, *Van Dyk*, 631 F.2d at 255). Petitioners are incapable of showing any such nexus. The Third Circuit correctly found that "[C]oast's naked contention that Mercedes' allocation method was unfair and resulted in reduced profits falls well short of the nexus required by the Clayton Act and relevant case law." 6a.

The Third Circuit's analysis is consistent with the precedent of this Court, which also quickly dispenses with any doubt that *Certiorari* should be denied. In *Story Parchment* and *Zenith Radio*, this Court settled, but Petitioner fails to grasp, the distinction between the fact of damage or injury as a separate, but prerequisite proof element, apart from the amount of damages. *Zenith Radio Corp. v. Hazeltine*, 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1968); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S. Ct. 248, 75 L. Ed. 544 (1931). Both cases highlight exactly why Petitioners' case deserved to collapse on summary judgment. In both cases, and unlike this case, some fact of injury was established.

In *Story Parchment*, this Court found, "[T]hat the petitioner was injured in its business and property as a result of this unlawful combination . . . finds sufficient support in the evidence." 282 U.S. 555, 560, 51 S. Ct. 248, 250, 75 L. Ed. 544, 547. The Court found fact of damage or injury, but the amount of the damages needed to be determined. The Court continued in clarification:

> It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of the damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to fix the amount. *Id.* at 562

Petitioners, with inadmissible expert reports rooted in hearsay and no other sound admissible evidence, simply failed to establish the fact of damage element in the courts below.

Petitioner's reliance on *Zenith Radio* similarly fails. 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1968). In *Zenith Radio*, this Court clarified the necessity of proving the fact of damage element: "[Plaintiff's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by *its proof of some damage flowing from the unlawful conspiracy.* It is enough that the illegality is shown to be a material cause of the injury." *Zenith Radio*, 395 U.S. at 114 n.9. (emphasis added); Pet. Br. at 15. Petitioner's argument has been that the damage flowing from the unlawful conspiracy was the retaliatory under-allocation of vehicles from MBUSA to Petitioner. However, Petitioner

never established that an under-allocation occurred. Therefore, "proof of some damage" does not exist in the record. *Ibid.*

Factually, *J. Truett Payne Co., Inc. v. Chrysler Motor Cars Corp.* is most analogous to this case, but even there, this Court required that liability be ascertained before the action was dismissed for lack of fact of damage. 451 U.S. 557, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981). In that case, Petitioner, a car dealer, was awarded a damages verdict in the district court, which the Respondent appealed, alleging that no fact of damages had been proven. Petitioner argued on appeal that the jury should be allowed to infer fact of damage from his evidence that Chrysler set Petitioner's sales objectives higher than his competitors, that Chrysler awarded price reductions in wholesale cars when those objectives were met and that, consequently, Petitioner's failure to meet his inflated objectives meant he paid more for his vehicles than his competitors. Calling this allowable inference by the jury "automatic damages," Petitioner wanted mere proof of discrimination to establish the fact and amount of damages. *J. Truett*, 451 U.S. at 560. Neither Petitioner nor petitioner's expert "offered documentary evidence as to the effect of the discrimination on retail prices." *Id.* at 564. The Court of Appeals for the Fifth Circuit reversed the jury verdict awarding damages with instructions to dismiss the case because Petitioner "failed to introduce substantial evidence of injury attributable to the programs . . ." *Id.* at 560. Petitioner appealed to this Court which remanded, but only because in the absence of any finding of fact on whether respondent had actually committed an anti-trust violation, it could not assess whether Petitioner should be allowed a more lenient standard: "[I]n this case . . . the issue is not so much the

amount of damages as whether petitioner has in fact been injured by an antitrust violation." *J. Truett*, 451 U.S. at 567, fn. 5. And this Court warned:

> In those cases where we have found sufficient evidence to permit a jury to infer antitrust injury and approximate the amount of damages, the evidence was more substantial that the evidence presented here. In *Zenith* . . . plaintiff compared its sales in Canada, where it was subject to a violation, with its sales in the United States, where it was not. And in *Bigelow*, plaintiff adduced evidence not only comparing its profits with a competitor not subject to the violation but also comparing its profits during the time the violation with the period immediately preceding the violation. *Id.* at 567; *See also*, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S. Ct. 574, 90 L. Ed. 652 (1946).

Finally, this Court in *J. Truett* warned, "We emphasize that even if there has been a violation of the . . . [Act], petitioner is not excused from its burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened." *J. Truett*, 451 U.S. at 568.

Petitioners are not excused from their burden of proving antitrust injury and damages. There is no conflict between the well-settled law on the disposition of antitrust claims on summary judgment and the decisions by the courts below in this case. *Certiorari* is unwarranted.

CONCLUSION

Petitioners' defective expert reports were properly barred by the district court's thorough *Daubert* analysis. As a result, Petitioners' inability to prove damages was fatal to every one of their anti-trust claims. Summary judgment on their counterclaim was therefore appropriate and correctly affirmed by the Third Circuit Court of Appeals. This case poses nothing but a routine and unremarkable disposition of a case that is without significance to anyone other than the private litigants themselves. It is unworthy of further review by this Court. For these reasons, the Petition for a Writ of Certiorari should be denied. Catena joins in all opposition submitted by the other Respondents.

Respectfully submitted,

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